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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1948

o——o——o

No. 507

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CITY OF OMAHA, a Municipal Corporation; CHARLES W. LEEMAN, Mayor; PAUL HAZE, Chief of Police; EDWARD F. FOGARTY, City Attorney; ASSOCIATED RETAILERS OF OMAHA, a Corporation; and OMAHA MASTER FURRIERS GUILD, an Unincorporated Association,

*Petitioners,*

vs.

FRANK BROTHERS FOOTWEAR, Inc., a Corporation,

*Respondent.*

o——o——o

## PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

o——o——o

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Law Briefs—OMAHA LINO-SLUG PRINTING CO.—418 South 15th Street

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**IN THE**

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**No. ————————**

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CITY OF OMAHA, a Municipal Corporation; CHARLES W. LEEMAN, Mayor; PAUL HAZE, Chief of Police; EDWARD F. FOGARTY, City Attorney; ASSOCIATED RETAILERS OF OMAHA, a Corporation; and OMAHA MASTER FURRIERS GUILD, an Unincorporated Association,

*Petitioners,*

vs.

FRANK BROTHERS FOOTWEAR, Inc., a Corporation,

*Respondent.*

o———o———o

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

*To the Honorable Fred M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:*

City of Omaha, a Municipal Corporation; Charles W. Leeman, Mayor; Paul Haze, Chief of Police; Edward F. Fogarty, City Attorney; Associated Retailers of Omaha, Corporation; and Omaha Master Furriers Guild, an

Unincorporated Association, Petitioners, respectfully pray that a Writ of Certiorari issue to review the final judgment of the Supreme Court of Nebraska entered in the above-entitled cause on June 29, 1948 (Motion for Rehearing being thereafter overruled on October 16, 1948), reversing a judgment of the District Court in and for Douglas County, Nebraska, and remanding the cause, whereby the Lower Court was directed under the de novo review power of the Nebraska Supreme Court to render a permanent injunction against the Petitioners, who were Defendants below, restraining them from enforcing the Omaha Itinerant Vendors' Ordinance[1] (and its Amendment[2]) as against the Respondent, Frank Brothers Footwear, Inc.

And in support of such Petition, your Petitioners respectfully show as follows:

## I.
## SUMMARY STATEMENT OF THE MATTER INVOLVED

The case involves the validity of a municipal occupation tax of $15.00 a day imposed, for revenue purposes, by the Omaha Municipal Code upon itinerant vendors, as defined in the Ordinance, that is to say, persons who, like the Respondent, do not maintain a regular place of business in Omaha but who solicit orders for, make local displays of, or take orders for merchandise, as, for instance, in the Respondent's case, during two-day hotel stands at regular intervals of twice a year; and, in the

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1 The portion of the main Ordinance pertinent to the inquiry herein is set out in the Appendix hereafter.

2 The Amendment represented by Ordinance No. 15524, imposing certain additional Surety Bond and Health Certificate requirements, is, however, in the process of being repealed.

exercise of the City's police power, requiring a permit (with a permit fee of $1.00) licensing such operation and (by the Amendment to the Ordinance) imposing certain Surety Bond and Health Certificate requirements, in the first instance, to protect against fraud, imposition, misrepresentation, cheating or sharp practice, on the one hand, and, in the last, the spread of infection or contagion, on the other.

**The Ordinance makes no distinction between residents and non-residents, or between those in intrastate or those in interstate business, or out-of-state or in-state merchants.**

The same Ordinance (before Amendment) had theretofore been held valid with respect to a local business;[3] but, in the instant case, it was held invalid by the Nebraska Supreme Court, as applied to an interstate commerce operation, under the Constitution of the United States as a discrimination against interstate commerce, notwithstanding that the Respondent—a New York house—and other merchandising firms of like character during their regular two or three day stands in hotel rooms, without paying any tax therefor, receive, as part of the public services of local government, the police and fire protection and other services furnished by the local government and paid for by the taxpayers of the City and State (Stip., B. of Ex. 23).

Because the State of Nebraska or its municipal subdivisions have not embraced the sales tax or its concomitant use tax or an income tax as a device for raising revenue for state and local government, but have, instead, relied on, and are by law confined to, property taxes, occupation taxes, and license fees for such revenue, the Re-

3 Erwin v. City of Omaha, 118 Neb. 331, 224 N. W. 692.

spondent and merchandising firms of like character, in consequence, achieve a complete immunity or practical total exemption from any character of tax (Stip., B. of Ex. 23). They thus have attained in Nebraska an island or shelter of complete freedom from tax, if the decision under visé stands.

Nevertheless, Respondent and other like merchandising firms, by their own admissions in the Record, regularly, although intermittently, pursue a lucrative business —conducted in its local phases of the display of merchandise, solicitation of orders therefor, and the actual taking of orders therefor—within the City of Omaha and under the protective services of the local government, for which the Respondent and other like merchandising firms pay absolutely nothing (T. 18 and Stip., B. of Ex. 23).

## II.

## JURISDICTION

The basis upon which it is contended that this Honorable Court has jurisdiction to review the Decision and Decree in question is as follows:

a. Title 28, United States Code, 1948 Edition, Section 1257 (Chapter 646 of Public Law 773), superseding Section 237 of the Judicial Code, as amended (28 U. S. C., Section 347), providing in Sub-section (3) that, where the validity of a State Statute (often interpreted as inclusive of municipal ordinances) is drawn in question on the ground of its being repugnant to the Constitution of the United States, a final judgment or decree of the highest court of a state may be reviewed by this Honorable Court by Writ of Certiorari.

See, also, Title 28, United States Code, 1948 Edition, Sections 2104 and 2106.

b. Rule 38, Section 5, Sub-section (a) of the Rules of the Supreme Court of the United States, providing for review on Writ of Certiorari in cases where a state court has decided a federal question of substance in a way probably not in accord with applicable decisions of this Honorable Court.

## III.

## THE QUESTIONS PRESENTED

The controlling questions presented in this Petition are:

1. Whether a state or the municipalities therein possess power to see that interstate commerce bears with local trade its fair share of the cost of local government, notwithstanding the Interstate Commerce Clause in the National Constitution.

2. Whether a state or municipalities therein can exact compensation for the protection it, or they, afford local activities within its, or their, borders from a business otherwise interstate in character.

3. Whether an occupation tax of $15.00 a day, not exceeding, and, in fact, less than, the daily local tax burden of retail merchant competitors, is a permissible local impost not contravening the National Commerce Clause.

4. Whether such tax is forbidden under Federal Constitutional standards because it is part of a licensing measure.

5. Whether interstate commerce is subject to regulation by the state or the municipalities therein in the exercise of their police power for the protection of legitimate local interests.

6. Whether the trend towards sustaining state and local taxes, formerly regarded as outlawed by the Commerce Clause (under the so-called "Drummer" cases), is sufficiently authenticated to permit a modest and element tax upon local phases of an otherwise interstate commerce operation.

7. Whether a valid and tenable distinction can be drawn in taxation measures by a state or municipalities therein between local tradesmen and itinerant dealers, where such measures are uniformly applicable to all persons pursuing a given occupation without distinction as to residence or non-residence or intrastate or interstate character.

8. Whether an occupation tax of $15.00 a day and the requirement of a permit for itinerant vendor operations, with protective Bond and Health Certificate incidents, impose an undue burden on an interstate commerce operation falling within its scope, or is obviously discriminatory against such interstate commerce.

9. Whether a special and definable suitor interest in retail merchant associations, composed of members competitive to Respondent, and supplying in the Record their comparative tax burdens,[4] justified their intervention as protecting, securing and promoting fair competitive conditions and equalizing economic advantages.

10. Whether an injunctive remedy was available to Respondent in view of the adequacy of the legal remedy in either criminal or refund of tax proceedings.

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4 The absence of which was particularly deplored in **Nippert v. City of Richmond**, 327 U. S. 416, 66 S. Ct. 586, 90 L. ed. 760.

11. Whether compliance by the Respondent with the Ordinances in all respects, in the interval pending the appeal to the State Supreme Court, without benefit of supersedeas (denied by the Lower Court and not applied for in the State Supreme Court), rendered the appeal of Respondent moot.

These questions were all answered adversely to the contentions of the Petitioners by the Supreme Court of Nebraska.

## IV.

## THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

The decision rendered by the Nebraska Supreme Court (and adhered to by the later overruling of the Petitioners' Motion for Rehearing) is manifestly not in accord with applicable and very recent decisions of this Honorable Court, particularly in the application of the Commerce Clause of the Federal Constitution.

Without here attempting to detail and enumerate all of them, your Petitioners, nevertheless, call attention to a few, particularly, the most recent—without elaborating them—as demonstrating the foregoing postulate:

1. The decision of the State Supreme Court does not mention and cannot be reconciled with the latest expression on this topic from this Honorable Court in *Memphis Natural Gas Company v. Stone*, 335 U. S. 80, 68 S. Ct. 1475, 92 L. ed. (adv. ops.) 1409, decided June 21, 1948, upholding a state franchise tax upon a wholly interstate commerce operation with respect to the public

services afforded local activities[5] incident to such interstate commerce operation.

2. The decision of the State Supreme Court likewise does not mention and cannot be reconciled with *Independent Warehouses, Inc., v. Scheele,* 331 U. S. 70, 67 S. Ct. 1062, 91 L. ed. 1346, likewise recently decided in 1947, upholding a township license tax impost by ordinance applicable to the storage of goods even though they were in the course of interstate commerce.

3. The State Supreme Court declined to follow the now well acknowledged principle that "interstate commerce must pay its way," as established in *Memphis Natural Gas Co. v. Stone,* supra (not mentioned by the State Supreme Court); *Joseph v. Carter & Weekes Stevedoring Company,* 330 U. S. 422, 67 S. Ct. 815, 91 L. ed. 993 (likewise not mentioned by the State Supreme Court); *Freeman v. Hewit,* 329 U. S. 249, 67 S. Ct. 274, 91 L. ed. 265; *Richfield Oil Corp. v. Board of Equalization,* 329 U. S. 69, 67 S. Ct. 156, 91 L. ed. 80 (likewise not mentioned by the State Supreme Court); and *Nippert v. City of Richmond,* 327 U. S. 416, 66 S. Ct. 586, 90 L. Ed. 760,— all very recent controlling decisions by this Honorable Court upon the topic.

4. The $15.00 a day occupation tax feature of the Omaha Itinerant Vendors' Ordinance cannot be considered as unduly repelling interstate commerce or as imposing an undue burden thereon in view of the relatively

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5 While **Memphis Natural Gas Co. v. Stone,** supra, was decided before the State Court's decision on June 29, 1948, it probably was not available to the State Supreme Court at the date of the decision; it was, however, brought to the State Court's attention on Motion for Rehearing.

higher taxes upheld—from the standpoint of amount alone —in *Memphis Natural Gas Co. v. Stone,* supra; *Aero Mayflower Transit Company v. Board of R. R. Commissioners,* 332 U. S. 495, 68 S. Ct. 167, 92 L. ed. (adv. ops.) 153, and *Aero Mayflower Transit Company v. Georgia Public Service Commission,* 295 U. S. 285, 55 S. Ct. 709, 79 L. ed. 1439.

5. The decision of the State Supreme Court is contrary to and does not mention on the subject of acknowledged state power to regulate interstate commerce, as, for instance, in the exercise of a municipality's police power, with respect to legitimate local purposes, *Panhandle Eastern Pipe Line Co. v. Public Service Commission,* 322 U. S. 507, 68 S. Ct. 190, 92 L. ed. (adv. ops.) 173; *Bob-Lo Excursion Co. v. Michigan,* 333 U. S. 28, 68 S. Ct. 358, 92 L. ed. (adv. ops.) 339; *Robertson v. California,* 328 U. S. 440, 66 S. Ct. 1160, 90 L. ed. 1366; *Prudential Insurance Co. v. Benjamin,* 328 U. S. 408, 66 S. Ct. 1142, 90 L. ed. 1342; and *Eichholz v. Public Service Commission,* 306 U. S. 268, 59 S. Ct. 532, 83 L. ed. 641.

6. The State Supreme Court acknowledged the proffer of the argument by your Petitioners that a trend away from the "Drummer" cases, commencing with *Robbins v. Shelby County Taxing District,* 120 U. S. 489, 75 S. Ct. 592, 30 L. ed. 694, was perceptible, but then failed to pursue the trend into the most recent cases acknowledging such trend as an accomplished fact, notwithstanding indubitable recent expressions in *Memphis Natural Gas Co. v. Stone,* supra; *Nippert v. City of Richmond,* supra; *Freeman v. Hewit,* supra (concurring opinion by Mr. Justice Rutledge); and *Richfield Oil Corp. v. State Board of Equalization,* supra. See, also, the tracing of the history

of the transition from the former *Robbins v. Shelby County Taxing District* doctrine to the present status, in the dissenting (in part) opinion of Mr. Justice Douglas in *Joseph v. Carter & Weekes Stevedoring Company*, supra.

7. The State Supreme Court failed to mention and ignored, as legally not constituting discrimination, the segregation, in the taxing and licensing measure, of itinerant vendors, contrary to *Singer Sewing Machine Co. v. Brickell*, 233 U. S. 304, 34 S. Ct. 493, 58 L. ed. 974; *Great Atlantic & Pacific Tea Co. v. Grosjean*, 301 U. S. 412, 57 S. Ct. 772, 81 L. ed. 1193; *Welch v. Henry*, 305 U. S. 134, 59 S. Ct. 121, 83 L. ed. 87; *Ford Motor Co. v. Beauchamp*, 308 U. S. 311, 60 S. Ct. 273, 84 L. ed. 304, and *Caskey Baking Company v. Commonwealth of Virginia*, 313 U. S. 117, 61 S. Ct. 881, 85 L. ed. 1223.

8. The State Supreme Court likewise misinterpreted the special interest of the Intervener retail merchant associations, as acknowledged in *Nelson v. Sears, Roebuck & Co.*, 312 U. S. 359, 61 S. Ct. 586, 85 L. ed. 888; *Welch v. Henry*, supra; *Great Atlantic & Pacific Tea Co. v. Grosjean*, supra; *Nippert v. City of Richmond*, supra, and *Freeman v. Hewit*, supra, in litigation of this character, where, in addition to the municipality's proper concern in its tax revenues and its regulatory functions, such retail merchants have a distinct suitor interest based upon the competitive methods (by way of procuring freedom in such litigation from tax burdens) of competitors.

9. The decision of the State Supreme Court, in extending the injunctive remedy to the Respondent, is at odds with *Beal, County Attorney, v. Missouri Pacific Railroad Corp.*, 312 U. S. 45, 61 S. Ct. 418, 85 L. ed. 577.

10. The State Supreme Court likewise misinterpreted the effect of holdings from this Honorable Court, rendering appeals moot where there has been full compliance by a complainant, like the Respondent herein, with the Ordinance pending the appeal, without benefit of supersedeas, as in *Singer Manufacturing Company v. Wright,* 141 U. S. 696, 12 S. Ct. 103, 35 L. ed. 906, and *Little v. Bowers,* 134 U. S. 547, 10 S. Ct. 620, 33 L. ed. 1016.

The matter is of indeed grave public importance to municipalities because of the notoriously currently strained condition of their treasuries and their inability to replenish them through the common forms of taxes, especially by reason of having reached the limits of permissible property levies. The trammeling, as by the decision of the Nebraska Supreme Court, of the power to secure non-property tax revenues, especially from "untouchable" interstate commerce enterprises, therefore, operates with severe impact upon such municipalities.

It is manifest, too, that a wide uncertainty as to the limits of permissible municipal taxation over interstate commerce enterprises should be promptly allayed in order that municipalities may take an intelligent perspective of their sources of revenue in the present exigency evident on every side in their search for a greater share of all tax revenues.

Certainly, an exemption—nowhere appearing or granted—to these interstate commerce enterprises—nevertheless exploiting local opportunities in the merchandising field to the utmost—should not be permitted to continue unchecked, as against fair and reasonable local im-

posts, clement in amount, as is the one in the instant case.

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## TENDER OF TRANSCRIPT OF RECORD

Your Petitioners present to this Honorable Court for filing herewith a duly certified Transcript of the entire Record in the case, as certified by the Clerk of the Supreme Court of Nebraska, which said Court is the highest Court of Law and Equity in said State of Nebraska.

o———o———o

## PRAYER

WHEREFORE, your Petitioners pray that a Writ of Certiorari issue under the Seal of this Court directed to the Supreme Court of Nebraska commanding said Court to certify and send to this Court a full and complete Transcript of the Record and of the proceedings of the said Supreme Court of Nebraska had in the case numbered and entitled on its Docket No. 32370, Frank Brothers Footwear, Inc., Appellant, v. City of Omaha, a Municipal Corporation, et al., Appellees, Associated Retailers of Omaha, a Corporation, et al., Interveners and Appellees, to the end that this cause may be reviewed and determined by this Honorable Court, as provided for by the Statutes of the United States; and that the judgment therein of the said Supreme Court of Nebraska be re-

versed by this Honorable Court; and for such further relief as to this Honorable Court may seem proper.

DATED at Omaha, Nebraska, January 3, 1949.

Respectfully submitted,

CITY OF OMAHA, a Municipal Corporation; CHARLES W. LEEMAN, Mayor; PAUL HAZE, Chief of Police; EDWARD F. FOGARTY, City Attorney; ASSOCIATED RETAILERS OF OMAHA, a Corporation; and OMAHA MASTER FURRIERS GUILD, an Unincorporated Association,

*Petitioners.*

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1948

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No. ————————

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CITY OF OMAHA, a Municipal Corporation; CHARLES W. LEEMAN, Mayor; PAUL HAZE, Chief of Police; EDWARD F. FOGARTY, City Attorney; ASSOCIATED RETAILERS OF OMAHA, a Corporation; and OMAHA MASTER FURRIERS GUILD, an Unincorporated Association,

*Petitioners,*

vs.

FRANK BROTHERS FOOTWEAR, Inc., a Corporation,

*Respondent.*

o——o——o

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

*May It Please the Court:*

The following is submitted in support of the foregoing Petition. Of necessity, it is not now proposed to elaborate the merits, as well as the citations of authorities.

## I.

## OPINION OF THE COURT BELOW

The opinion of the Nebraska Supreme Court is reported in 149 Neb. 888, 33 N. W. (2d) 161.

Inasmuch as the case was controlled by another and identical case, decided the same day (it not being deemed requisite to seek Certiorari in both cases, as one controls the other), reference is made to the companion case of *Best & Co., Inc., v. City of Omaha*, reported in 149 Neb. 868, 33 N. W. (2d) 150, where a more extended opinion was rendered.

## II.

## JURISDICTION

This Honorable Court's jurisdiction is invoked pursuant to Title 28, United States Code, 1948 Edition, Section 1257, as recently enacted, effective September 1, 1948 —this Court's jurisdiction being further implemented by Title 28, United States Code, 1948 Edition, Sections 2104 and 2106—and also pursuant to Rule 38, Section 5, Sub-Section (a) of the Rules of this Court.

The date of the decision and decree of the Nebraska Supreme Court was June 29, 1948, and the Motion for Rehearing by Petitioners, as Appellees in that case, was overruled on October 16, 1948.

## III.

## STATEMENT OF THE CASE

A Statement of the Case appears in the foregoing Petition and such Statement is hereby adopted and by reference made a part of this Brief. We wish to amplify

it, however, to some extent for reasons of better perspective.

Respondent is a foreign New York corporation engaged in the retail sale of footwear and kindred products and through sales representatives it displayed samples of merchandise within Omaha, Nebraska, solicited orders therefor, and, from such customers as were favorably impressed, took orders for their delivery, subject to acceptance at its home office.

As appears from the Affidavit of President Livers of the Respondent, it is stated (T18):

> "* * * that the corporation does not maintain any regular place of business in Omaha, Nebraska, or within the State of Nebraska, but has solicited orders in Omaha, Nebraska, in the manner aforesaid, twice a year and for a few days at a time for more than twenty-five (25) years, and has thereby created valuable good will among its customers in that City; that the corporation now enjoys a lucrative and valuable business with customers residing in and about the City of Omaha, Nebraska, in the manner aforesaid; that the corporation desires and intends to carry on said activities in Omaha, Nebraska, in the same manner that they have been carried on in the past for many years to come; * * *."[6]

As found by the Trial Court (T50), it was the custom of the Respondent to conduct activities within Omaha following a prior circularizing campaign on prospective customers within the city, inviting to hotel stands or other temporary stands of two or three days' duration at intervals of two times a year, every year, consisting of:

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6 This distinguishes the instant case from the activities of Dorothy Nippert in Nippert v. City of Richmond, supra.

a. Solicitations of such prospective customers as resorted to the hotel or other premises in response to such invitation.

b. Displays of the Respondent's merchandise at the hotel or other premises.

c. The taking of orders from such prospective customers as were successfully solicited.

**It seems to have been overlooked by the State Supreme Court that not all solicitations and displays under a. and b. above resulted in orders or interstate sales; certainly these were definitely local activities.**

The Omaha Itinerant Vendors' Ordinance was tailored **not to impinge upon interstate commerce operations alone;** it made no distinction between residents or non-residents, intrastate or interstate operations; it only brought within its compass those transient vendors or merchants who did not have established places of business within the City, which would be otherwise taxed. Consequently, no like, or similar, tax was laid upon other merchants who did have established places of business within Omaha, Nebraska.[7]

In other words, the Ordinance made no distinction between the out-of-state and the in-state merchant. It embraced that large horde of transient merchants like roving photographers, traveling magazine solicitors, roll-

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7 This, accordingly, distinguishes **Best & Co. v. Maxwell,** 311 U. S. 454, 61 S. Ct. 334, 84 L. ed. 275, where the out of town merchant was taxed $250 a year and the local merchant $1.00 a year, resulting in patent discrimination against interstate commerce, or, as expressed in **General Trading Co. v. State Tax Commission of Iowa,** 322 U. S. 335, 64 S. Ct. 1028, 88 L. ed. 1309, concerning **Best & Co. v. Maxwell,** supra, North Carolina had enacted "* * * legislation obviously hostile or practically discriminatory towards interstate commerce."

ing stores, peddlers and other so-called gypsy caravans—to borrow the current phrase—who had become "untouchables" from the taxation standpoint by reason of their roving operations.[8] Neither by words nor by application could the Ordinance be said to rest more heavily on the out-of-state merchant than the in-state merchant practicing the same occupation of an itinerant merchant. No invidious distinctions are carved out by the Ordinance so as to cause impingement only on the out-of-state merchant. We stress this as it seems to have been significantly overlooked by the State Supreme Court.[9]

It was further stipulated (B. of Ex. 23) that the Respondent and other merchandising concerns of like character received, as part of the public services of local government, the police and fire protection and other services furnished by the local government and paid for by the taxpayers of Omaha, Nebraska, including, in part, the retail merchant members of the Interveners, but paid nothing in the way of taxes. By comparison, the retail merchant and furrier members of the Interveners, on an annual business volume aggregating $40,500,000 or an average volume of $3,080 per business day, paid state and local taxes of $507,778 or at the rate of $48 per business day—as compared to the $15 per business day occupation tax, opposed and refused to be paid by the Respondent, where sales during a recent fur salon of a like concern on a two or three-day stand aggregated as much as $50,000 (B. of Ex. 22).

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8 A somewhat parallel Nebraska Statute, affecting itinerant merchants by motor vehicle, likewise distinguishes the "established place of business." Section 60-701, et seq., Rev. Stat. Nebr. 1943.

9 The decision of the State Supreme Court likewise operated to invalidate other like Ordinances of other municipalities in Nebraska, so that the League of Nebraska Municipalities and several City Attorneys, struck with consternation by the decision, appeared by Brief of Amicus Curiae in support of the Motion for Rehearing.

As to the regularity and continuity of the operations of these interstate itinerant merchants—they obtain (through their regular return to the City and their repetitious interim advertising) a concentration during four or five days in the year not attained by the local merchants in weeks or months—simply because they are *not* in Omaha oftener. In other words, they accomplish this by their advertising in advance, the drawing power of their national names, their studied refraining from coming oftener—resulting in customers actually waiting with their orders for their two or three-day stands. This means, then, competition with the local merchants all the time—the year around. They are, accordingly, not mere occasional transients (like Dorothy Nippert); they are as regular—although intermittent—as rain—in Omaha every year, twice a year, two or three days each time, twenty to twenty-five years. In sum, therefore, the local merchants are shouldering the taxes of these non-paying merchants while the latter are competing with the local merchants for the same business—achieving a status of complete tax exemption—of "no tax at all," converting the Interstate Commerce Clause into a Tax Exemption clause (which it distinctly is not); they achieve the tax impregnable position of the mail order establishments and yet partake of the advantages of the local merchants, to-wit, the actual display of goods and personal contact with the customers—seeking the advantages of both the mail order house and the local merchant, but the responsibilities and burdens of neither.

In support of a Motion to Dismiss the Respondent's appeal to the Supreme Court of Nebraska and by way of Plea in Abatement Thereof, it was also shown that on two different occasions, without benefit of supersedeas, the Respondent complied in all respects with the Omaha

Itinerant Vendors' Ordinance, that is to say, on September 30, 1947, with respect to two different hotel stands on the 8th and 9th days of October, 1947, and on the 17th and 18th days of November, 1947, and again on January 23, 1948, with respect to a hotel stand on January 23 and 24, 1948.

## IV.

## SPECIFICATION OF ERRORS

Embracing all "The Questions Presented," as set out in the foregoing Petition, the Petitioners submit that the Nebraska Supreme Court erred—

a. In holding that the Omaha Itinerant Vendors' Ordinance unlawfully undertook to regulate interstate commerce in violation of the Commerce Clause. U. S. C. A. Const., Art. 1, Section 8.

b. In rejecting a separate suitor interest in the Intervener merchant associations measured by their separate interest in the competitive practices, including the relative tax burdens—or their absence—of competitors, through achieving, by injunction, an exemption and immunity from any tax.

c. In extending an injunctive remedy to Respondent, notwithstanding the adequacy of its legal remedy.

d. In failing to dismiss the appeal of the Respondent to the Nebraska Supreme Court as moot, when in the interval, without benefit of supersedeas, the Respondent fully complied with the Omaha Itinerant Vendors' Ordinance on two different occasions with respect to three different two-day hotel stands.

## V.

## ARGUMENT

As portraying the incongruity of the decision of the Nebraska Supreme Court with established law as emanating from this Court, particularly in its more recent pronouncements, we here draw attention to a few, as pointing the propriety of an exercise of the discretion of this Honorable Court to grant Certiorari.

### Right of Municipalities to Differentiate Itinerant Vendors for Separate Tax and License Treatment

With respect to a situation where "regularly established places of business" were differentiated from the occupation tax applicable to transient dealers, *Singer Sewing Machine Co. v. Brickell*, 233 U. S. 304, 34 S. Ct. 493, 58 L. ed. 974, said:

> "The statute under consideration does not in direct terms or by necessary inference manifest an intent to regulate or burden interstate commerce. Full and fair effect can be given to its provisions, and an unconstitutional meaning can be avoided, by indulging the natural presumption that the legislature was intending to tax only that which it constitutionally might tax.
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> * * * * *
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> "But there is an evident difference, in the mode of doing business, between the local tradesman and the itinerant dealer, and we are unable to say that the distinction made between them for purposes of taxation is arbitrarily made. In such matters the states necessarily enjoy a wide range of discretion, and it would require a clear case to justify the courts in striking down a law that is uniformly applicable to all persons pursuing a given occupation, on the

ground that persons engaged in other occupations more or less like it ought to be similarly taxed."

* * * * *

"The state has a wide range of discretion with respect to establishing classes for the purpose of imposing revenue taxes, and its laws upon the subject are not to be set aside as discriminatory unless it clearly appears that there is no rational basis for the classification."

Accord, *Robertson v. California*, 328 U. S. 440, 66 S. Ct. 1160, 90 L. ed. 1366, upholding a licensing by the state of the agent of a foreign insurance company, even though local agents were not required to procure such license; and *Prudential Insurance Company v. Benjamin*, 328 U. S. 408, 66 S. Ct. 1142, 90 L. ed. 1342.

In *Caskey Baking Company v. Commonwealth of Virginia*, 313 U. S. 117, 61 S. Ct. 881, 85 L. ed. 1223, this Court likewise said:

"Some occupations may be taxed though others are not. Some may be taxed at one rate, others at a different rate. Classification is not discrimination. It is enough that those in the same class are treated with equality. That is true here."

And an exact apportionment is not requisite, for "rough approximation rather than precision" is sufficient. *International Harvester Co. v. Evatt*, 329 U. S. 416, 67 S. Ct. 444, 91 L. ed. 390.

**No Illegal Discrimination in Tax Treatment as Between Local and Non-Local Merchants**

The Omaha Ordinance took cognizance of, but the Nebraska Court failed to observe, *Great Atlantic & Pa-*

*cific Tea Co. v. Grosjean,* 301 U. S. 412, 57 S. Ct. 772, 81 L. ed. 1193, where this Court held:

> "Taxation may be made the implement of exercise of state's police power, and hence proper and reasonable discrimination between classes to promote fair competitive conditions and to equalize economic advantages is lawful."

**Interstate Commerce Is Not Immune from Local Taxation**

Contrary to the Nebraska Court's pronouncements, this Court in *Nippert v. City of Richmond,* 327 U. S. 416, 66 S. Ct. 586, 90 L. ed. 760, acknowledged that—

> "There is no lack of power in the state or municipalities to see that interstate commerce bears with local trade its fair share of the cost of local government, more especially in view of recent trends in this field."

So, in *Freeman v. Hewit,* 329 U. S. 249, 67 S. Ct. 274, 91 L. ed. 265, the opinion adverts to a "justified" state taxation falling on interstate commerce when—

> "* * * designed to make such commerce bear a fair share of the cost of the local government whose protection it enjoys."
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> * * * * *
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> "* * * As a practical matter it (the State) can make such commerce pay its way, as the phrase runs, apart from taxing the very sale."

The concurring opinion in that case likewise states:

> "The commerce clause was not designed or intended to outlaw all state taxes bearing 'directly' on interstate commerce. Its design was only to exclude those having the effects to block or impede it which called it and the Constitution itself into being. *Not*

*all state taxes,* nor indeed all *direct state taxes, can be said to produce those effects.*" (Emphasis in part supplied.)

* * * * *

"This Court has gone far in sustaining state taxes laid upon local incidents of interstate transactions by both of the state of origin and the state of the market in recent years. Perhaps it may be said, in view of such decisions, that it has more clearly sustained such taxes at the marketing end than by the state of origin, although this may be a matter of debate."

* * * * *

"*The trend of recent decisions has been toward sustaining state taxes formerly regarded as outlawed by the commerce clause.*" (Emphasis supplied.)

In *Richfield Oil Corp. v. State Board of Equalization,* 329 U. S. 69, 67 S. Ct. 156, 91 L. ed. 80, this Court said:

"Moreover, the Commerce Clause is cast, not in terms of a prohibition against taxes, but in terms of a power on the part of Congress to regulate commerce."

* * * * *

"But the scope of the limitation has been determined by the Court in an effort to maintain an area of trade free from state interference and at the same time to make interstate commerce pay its way."

In another case, which is still in the process of reviewing this problem (a phase of which was decided by the Supreme Court of Errors of Connecticut on July 21, 1948, after a remand from this Honorable Court in *Spector Motor Service, Inc., v. McLaughlin,* 323 U. S. 101, 65 S. Ct. 152, 89 L. ed. 101, returning the case to the Circuit Court of Appeals, until state constitutional aspects had first been determined by the Courts of Connecticut), the

Circuit Court of Appeals has said in *Spector Motor Service, Inc., v. Walsh* (C. C. A. 2), 139 F. (2d) 809:

> "The traditional dogma is that a state cannot tax interstate commerce, the business which constitutes such commerce, or the privilege of engaging in it."
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> * * * * *
>
> "In the past years, however, many exceptions have served increasingly to limit this strict rule."
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> * * * * *
>
> "The trend is away from the automatic condemnation of taxes by formal, preconceived and antiquated rules. As was said in Wisconsin v. J. C. Penney Co., 311 U. S. 435, 445, 61 S. Ct. 246, 250, 85 L. ed. 267, 130 A. L. R. 1229: 'We must be on guard against imprisoning the taxing power of the states within formulas that are not compelled by the Constitution but merely represent judicial generalizations exceeding the concrete circumstances which they profess to summarize.'"
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> * * * * *
>
> "Indeed, if we should strike down the tax against plaintiff, we would be discriminating against intrastate business, which would still have its burdens to pay under the tax and which is just as much entitled to constitutional protection from discrimination as interstate commerce, as the dissents of Mr. Justice Brandeis and Mr. Justice Black, cited above, in particular have pointed out. As a matter of fact, such an action by us would mean that a corporation which does a vast business within the state will escape completely from contributing to the expenses of the state."

That far-reaching decision, as to which Certiorari was granted by this Honorable Court, expresses other considerations favoring the exercise of the City of Omaha's

taxing and police powers, and, as indicated, the views expressed therein were not rejected by this Honorable Court, but the case was merely remanded for settlement of state questions now recently settled favorably to the State. *Spector Motor Service, Inc., v. Walsh,* 135 Conn. 37, 61 Atl. (2d) 89. See, also, *West Publishing Company v. McColgan,* 27 Cal. (2d) 705, 166 Pac. (2d) 861, aff'd per curiam 328 U. S. 823, 66 S. Ct. 1378, 90 L. ed. 1603.

**Taxation as a Measure of Compensation for Public Services**

The Nebraska Court seemed to regard the instant occupation tax as vindictively applied to stifle interstate commerce. Such, however, is not the nature of taxation for as stated in *Welch v. Henry,* 305 U. S. 134, 59 S. Ct. 121, 83 L. ed. 87:

> " 'Taxation' is neither a penalty imposed on the taxpayer nor a liability which he assumes by contract, but it is a way of apportioning the cost of government among those who in some measure are privileged to enjoy its benefits and must bear its burdens."

And in *Ford Motor Co. v. Beauchamp,* 308 U. S. 311, 60 S. Ct. 273, 84 L. ed. 304, this Court likewise said:

> "The exploitation by foreign corporations of intrastate opportunities under the protection and encouragement of local government offers a basis for taxation as unrestricted as that for domestic corporations. In laying a local privilege tax, the state sovereignty may place a charge upon that privilege for the protection afforded."

Accord, *Caskey Baking Company v. Commonwealth of Virginia,* 313 U. S. 117, 61 S. Ct. 881, 85 L. ed. 1223.

**Extent of Trend Away from the "Drummer" Cases Doctrine**

The Nebraska Court applied *Robbins v. Shelby County Taxing District*, 120 U. S. 489, 75 S. Ct. 592, 30 L. ed. 694, in all its pristine vigor, in disposing of the instant case, quoting as current law the following therefrom:

> "Interstate commerce cannot be taxed at all by a state, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the state."

and turned a blind eye on more recent cases.

But the foregoing is not current law, for in *Memphis Natural Gas Co. v. Stone*, 335 U. S. 80, 68 S. Ct. 1475, 92 L. ed. (adv. ops.) 1409, decided June 21, 1948, this Honorable Court upheld a state franchise tax upon a wholly interstate commerce operation with respect to compensation for public services afforded local activities incident to such interstate commerce, and said in the prevailing opinion:

> "We think that the state is within its constitutional rights in exacting compensation under this statute for the protection it affords the activities within its borders. Of course, the interstate commerce could not be conducted without these local activities. But that fact is not conclusive. These are events apart from the flow of commerce. This is a tax on activities for which the state, not the United States, gives protection and the state is entitled to compensation when its tax cannot be said to be an unreasonable burden or a toll on the interstate business."

And in a concurring opinion, it was added:

> "But they (the local activities) are incidents of carrying on that business taking place in Mississippi and only there, for which Mississippi affords protec-

> tion received from no other state or the United States. Nor can any other state give that protection. For that portion of the business and the protection given it, I think the state is entitled to levy such a tax as has been placed here. Nothing in the commerce clause or its great purposes forbids such an exaction."[10]

And as indicating that the case of *Memphis Natural Gas Company v. Stone*, supra, is a milestone decision illustrating

> "the increasing reluctance of the Court to thwart the States in meeting modern economic conditions (which) should result in broadening the power of the states to tax business carried on across state lines,"

an article on "State Franchise Taxation of Interstate Businesses" by Hellerstein in the November, 1948 issue, Volume 4, No. 1, p. 95, of Tax Law Review discusses *Memphis Natural Gas Co. v. Stone*, supra, at length. As background, the commentator points out:

> "Increasingly, it became apparent that the Court was the prisoner of a piece of conceptualism, the victim of a doctrine which had little bearing on the economic facts of life or the revenue needs of the states. In the meantime, the states' revenues suffered and local businessmen were discriminated against by the

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10 The acknowledgment of the trend is signalized in many contemporary Law Journals. See "State Tax Barriers to Interstate Trade", 53 Harvard Law Review, pp. 1253, 1255, 1258 and 1260; "Jurisdictional and Interstate Commerce Problems in the Imposition of Excise on Sales", 8 Law and Contemporary Problems 482; "Taxation—State Gross Receipts Tax—Receipts from Interstate Sale of Securities Not Taxable", Chicago Law Review, 503; "Constitutional Law—State Taxation of Interstate Commerce", 44 Michigan Law Review 1135; and "State Taxation of Interstate Commerce", 36 Illinois Law Review, 737.

> immunity of their larger and more powerful competitors from numerous state levies." (p. 101)

and concludes:

> "These are fiscal problems of great importance to the revenues of the state, to the competitive position of local and interstate business, and to the development of the American economy. They should not turn on 'dialectics' but on 'business realities' and a practical consideration of the public fisc upon which they have their impact." (p. 114)

**License Tax Applicable to Interstate Commerce Not Invalid**

The opinion of the Nebraska Court seems to consider as in a separate offending category a fixed sum license tax, but it failed to mention *Independent Warehouses, Inc., v. Scheele*, 331 U. S. 70, 67 S. Ct. 1062, 91 L. ed. 1346, upholding a license tax imposed by a township ordinance on storage of goods in the course of interstate commerce, where this Court said:

> "It follows that the tax is not forbidden because it is part of a licensing measure. Even where it is undisputed that the commerce is exclusively interstate in nature, 'not the mere fact or form of licensing, but what the license stands for by way of regulation is important.' Robertson v. California, 328 U. S. 440, 458, 90 L. ed. 1366, 1373, 66 S. Ct. 1160. See also Union Brokerage Co. v. Jensen, 322 U. S. 202, 88 L. ed. 1227, 64 S. Ct. 967, 152 A. L. R. 1072; Federal Compress & Warehouse Co. v. McLean, 291 U. S. 17, 78 L. ed. 622, 54 S. Ct. 267. Nor does anything in the Interstate Commerce Act forbid local taxation where it is otherwise permissible. The tax therefore is valid under the commerce clause."

Accord, *Kehrer v. Stewart*, 197 U. S. 60, 25 S. Ct. 403,

49 L. ed. 663, and *Wiggins Ferry Co. v. City of East St. Louis*, 107 U. S. 365, 2 S. Ct. 257, 27 L. ed. 419.

**Only Undue or Discriminatory Burden Forbidden**

As stated in *Nippert v. City of Richmond*, 327 U. S. 416, 66 S. Ct. 586, 90 L. ed. 760:

> "As has been so often stated but nevertheless seems to require constant repetition, not all burdens upon commerce, but only undue or discriminatory ones, are forbidden."

Accord, *Postal Telegraph Co. v. Richmond*, 249 U. S. 252, 63 L. ed. 590, 39 S. Ct. 265; *Western Live Stock v. Bureau of Revenue*, 303 U. S. 250, 82 L. ed. 823, 58 S. Ct. 546; *McGoldrick v. Berwind-White Coal Mining Company*, 309 U. S. 33, 60 S. Ct. 388, 84 L. ed. 536; and *Nelson v. Sears, Roebuck & Co.*, 312 U. S. 359, 61 S. Ct. 586, 85 L. ed. 888.

**State and Municipal Power to Regulate Interstate Commerce for Local Purposes**

*Panhandle Eastern Pipe Line Co. v. Public Service Commission*, 322 U. S. 507, 68 S. Ct. 190, 92 L. ed. (adv. ops.) 173, upheld the exercise by a state of power to regulate interstate commerce, where such power exists, and said:

> "It is the power to require that it be done on terms reasonably related to the necessity for protecting the local interests on which the power rests."

Accord, *Bob-Lo Excursion Co. v. Michigan*, 333 U. S. 28, 68 S. Ct. 358, 92 L. ed. (adv. ops.) 339, and *Robertson v. California*, supra, and *Prudential Insurance Company v. Benjamin*, supra.

Similarly, in *Eichholz v. Public Service Commission,* 306 U. S. 268, 59 S. Ct. 532, 83 L. ed. 641, it was held:

> "In the absence of the exercise of Federal authority over interstate commerce, and in the light of local exigencies, a state is free to act in order to protect its legitimate interests in the regulation of intrastate commerce even though interstate commerce is directly affected thereby."

**Tax Exemption or Immunity Jealously Regarded**

In *Stone v. Interstate Natural Gas Co.* (C. C. A. 5), 103 F. (2d) 544, aff'd per curiam, 308 U. S. 522, 60 S. Ct. 292, 84 L. ed. 442,—and followed with approval in *Memphis Natural Gas Co. v. Stone,* supra,—the Court said:

> "Any immunity from general taxation appears more and more inconvenient and unjust. The recent reexamination of the basis for such immunities has resulted in an upheaval. The current of authority has been turned."
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> * * * * *
>
> "A basic principle is that taxation is vital both to the State and National governments; to be concurrently exercised by both with as little interference as possible by one with the other. Another basic principle is that immunity from taxation ought to be jealously regarded."
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> * * * * *
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> "An implication of immunity based on constitutional provisions ought to be a necessary implication, and to extend no further than the necessity requires; and this especially when the immunity is invoked not in behalf of a government but of a citizen or private corporation. It is clear also that because a matter is regulable only by one government it is not thereby exempted from just taxation by the other."
>
> * * * * *

> "Conversely, the clause of the federal Constitution vesting exclusive power to regulate interstate and foreign commerce in Congress ought not of itself to exempt such commerce and those who carry it on in a State from a decent and non-discriminatory State taxation."

**Burden Too Slight to Result in Invalidation of Tax**

The tax upheld in *Memphis Natural Gas Co. v. Stone*, supra, was $3,400.00 and was not regarded as excessive. In *Aero Mayflower Transit Company v. Board of R. R. Commissioners*, 332 U. S. 495, 68 S. Ct. 167, 92 L. ed. (adv. ops.) 153, a tax against motor carriers engaged exclusively in interstate commerce amounted to $10.00 per vehicle, plus a fee of one-half of one per cent of the gross operating revenue, with an annual minimum requirement of $15.00 per vehicle. Sustaining the impost on the now oft-expressed concept of payment of a fair share of the cost of local government, the Court added in the opinion:

> "And, as we have said, the aggregate amount of both taxes combined is less than that of taxes heretofore sustained. In view of these facts there is not even semblance of substance to appellant's contention that the taxes are excessive."

Accord, *Aero Mayflower Transit Company v. Georgia Public Service Commission*, 295 U. S. 285, 55 S. Ct. 709, 79 L. ed. 1439.

**Precedents for Validity of Occupation Tax**

That occupation taxes are a common and acknowledged mode of realizing tax revenues is evident from many cases, including *American Manufacturing Co. v. St. Louis*, 250 U. S. 459, 39 S. Ct. 522, 63 L. ed. 1084, agreed upon in the majority and minority opinions in *Joseph v.*

*Carter & Weekes Stevedoring Company,* 330 U. S. 422, 67 S. Ct. 815, 91 L. ed. 993, as reflecting current law. That earlier decision upheld a municipal occupation tax upon a manufacturing operation even though all the goods manufactured were for interstate disposition.

Accord, *United States Glue Co. v. Oak Creek,* 247 U. S. 321, 38 S. Ct. 499, 62 L. ed. 1135; *Department of Treasury v. Wood Preserving Corp.,* 313 U. S. 62, 61 S. Ct. 885, 85 L. ed. 1188; *Department of Treasury v. Ingram-Richardson Mfg. Co.,* 313 U. S. 252, 61 S. Ct. 866, 85 L. ed. 1313; *Aponaug Mfg. Co. v. Stone,* 314 U. S. 577, 62 S. Ct. 131, 86 L. ed. 467, aff'g per curiam 190 Miss. 805, 1 So. (2d) 763; and *Wiggins Ferry Co. v. City of East St. Louis,* 107 U. S. 365, 2 S. Ct. 257, 27 L. ed. 419.

And in *Stone v. Interstate Natural Gas Co.* (C. C. A. 5), 103 F. (2d) 544, aff'g per curiam, 308 U. S. 522, 60 S. Ct. 292, 84 L. ed. 442—and which case was followed with approval in *Memphis Natural Gas Co. v. Stone,* supra —the Court said in the opinion:

> "And interstate carriers and merchants must pay general property taxes for State protection to their property in the State. Now when such property taxes prove insufficient to support the State government which protects their business as well as their property, why should not general taxes in other forms be shared by them, where not expressly prohibited by the Constitution?"

**Separate Suitor Interest of Interveners**

It is implicit in *Great Atlantic & Pacific Tea Co. v. Grosjean,* 301 U. S. 412, 57 S. Ct. 772, 81 L. ed. 1193, that an effort by the Respondent and other like merchandising concerns, to carve out through litigation an island of im-

munity from taxation, affects competitive methods of competitors, for there the Court held:

> "Taxation may be made the implement of exercise of state's police power, and hence proper and reasonable discrimination between classes to promote fair competitive conditions and to equalize economic advantages is lawful."

In *Freeman v. Hewit,* supra, the concurring opinion likewise acknowledged that—

> "local trade was then placed at a disadvantage with interstate trade, and the Commerce Clause thereby became a refuge for tax exemption, not simply a means of protection against unequal or undue taxation."

These partial references sufficiently illustrate that litigation of this character draws into the arena, not merely the question of a return of tax revenues to the municipality, but the question of the equipoise—or its disturbance—as between competing local and interstate merchants.[11]

**Injunction Not Available to Restrain Criminal Prosecutions**

That Courts of Equity do not ordinarily restrain criminal prosecutions, even though unauthorized and hence unlawful, when the issue of lawfulness may be tested in either criminal or other proceedings, is evident from *Beal, County Attorney, v. Missouri Pacific Railroad Corp.,* 312 U. S. 45, 85 L. ed. 577, 61 S. Ct. 418.

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11 That equally important interests of local merchants are discriminated against by the tax exemption of their untaxed competitors is also noted in the foregoing contemporary Law Journals. 53 Harvard Law Review 1253; 8 Law and Contemporary Problems 482; and 36 Illinois Law Review 727.

**Appeal Becomes Moot Where Respondent in Interim Complied with Allegedly Offending Ordinance**

Under parallel circumstances, an appeal was dismissed as moot in *Singer Manufacturing Company v. Wright,* 141 U. S. 696, 12 S. Ct. 103, 35 L. ed. 906.

Accord, *Little v. Bowers,* 134 U. S. 547, 10 S. Ct. 620, 33 L. ed. 1016; *San Mateo County v. Southern Pacific R. R. Company,* 116 U. S. 138, 6 S. Ct. 317, 29 L. ed. 589; *State of California v. San Pablo & Tulare R. Co.,* 149 U. S. 308, 13 S. Ct. 876, 37 L. ed. 747, and *Addington v. Burke,* 125 U. S. 696, 8 S. Ct. 1391, 31 L. ed. 853.

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## CONCLUSION

We respectfully submit that the case presents an important question of Federal law and of wide public interest which, accordingly, should be decided by this Honorable Court. The wide swing in doctrinaire concepts—ranging from the former absolute bar of local taxation of interstate commerce under the now outmoded "Drummer" cases to the present permissible local taxation of local aspects of interstate commerce in an effort measurably to recompense states and municipalities for the services of local government—requires that the decision of the Nebraska Supreme Court—adhering slavishly to the former concept—should be reviewed and re-examined. Certainly, the decision of the Nebraska Supreme Court, under visé herein, was outmoded the minute it was rendered, especially in the light of the contemporaneous decision of this Honorable Court in *Memphis Natural Gas Co. v. Stone,* supra, and the prior decision of *Independent Warehouses, Inc., v. Scheele,* supra, neither of which significant

decisions, sustaining state taxation of interstate commerce, the State Supreme Court even mentioned.

We accordingly submit that Certiorari should be granted that the decision of the Nebraska Supreme Court may be reversed and corrected.

Respectfully submitted,

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## APPENDIX

### Ordinances Involved

The portions of Chapter 22, Article I, of Ordinance No. 14924, pertinent to this case, follow:

22-1.1. ITINERANT VENDORS, PERMITS, OCCUPATION TAX, PENALTIES. That the term "Person," as herein used, shall and does include persons, corporations, partnerships, or associations of persons, real or artificial.

That the term "Itinerant vendor" for the uses and purposes of this Article is defined to be any person, either as principal, agent or employee, who does not intend to conduct his business in the City of Omaha for a period of longer than one hundred twenty days, or who does not maintain a regular place of business in Omaha for the conduct of retail trade; and who locates in a store, building, or place of business, or a hotel room, or who goes about from house to house or office to office, or solicits by mail, advertising, dodgers, circulars, telephone or other method; and who offers for sale, barter, auction, trade or exchange, or sells or takes orders for, goods, wares, or merchandise, or issues or distributes coupons, certificates or other writings which entitle the holder thereof to any goods, wares or merchandise at retail, or which entitle the holder to acquire same upon any condition.

It is hereby made unlawful for an itinerant vendor as herein defined, to carry on or offer to carry on, the character of business above defined, and to sell or offer to sell by any of the means above set out, or in the manner above set out, any goods, wares, or merchandise or coupons, certificates or writings, entitling purchasers or holders thereof as above specified without first having procured a permit from the City so to do.

Any person desiring a permit to carry on the character of business above defined, shall make an application therefor in writing to the City Council of the City of Omaha, said application to state the name, age and residence of the applicant, whether the applicant is acting on behalf of a corporation, partnership or individual, the address of the principal officer of such corporation, partnership or individual; the address of the local headquarters or place in the City of Omaha from which such business is to be conducted, the period during which such business is to be carried on; a description of the goods, wares or merchandise handled by the applicant, and the name and address of each local agent or solicitor employed or to be employed, by such applicant, in connection with such business. Such application shall be presented to the City Council at its next regular meeting, when a date for hearing thereon shall be designated, which date shall be not less than five days nor more than fifteen days from the date of presentation of the application to the Council. At such hearing the City Council shall inquire into the character of the applicant and of the solicitors or agents named by him and into the character of the goods, wares and merchandise to be handled, and if the Council shall find that said applicant or his agents, or any of his agents or solicitors are not persons of good character, or that the goods, wares and merchandise to be handled or the method of handling same are involved in misrepresentation or dishonesty, the said application shall be denied, and if it is not so found, said application shall be granted. Upon approval thereof by the City Council, the permit provided for herein shall be issued by the City Clerk, and state therein the date issued, person to whom issued, kind and character of business and the place where such business is to be carried on and the period during which said permit shall be in force, which shall not be more than one hundred twenty days from the date of issue. The permit when so issued shall entitle the

itinerant vendor to conduct for a period of time not longer than one hundred twenty days from the date of issue, the business of selling or offering for sale, goods, wares and merchandise as described in the application and permit, or coupons, certificates or writings entitling holders or purchasers thereof to any character of goods, wares or merchandise of any legal kind and character as may be described in the permit, and at the place designated thereon, but the conduct thereof shall be subject to all reasonable rules and regulations and ordinances of the City as respects place of sale and manner of sale as well as the conduct and carrying on of such business. Each salesman or solicitor designated in the application of his or her employer, as provided in this Section, shall personally appear before the City Clerk of the City of Omaha and upon payment of a fee of One Dollar ($1.00) each shall receive a permit to act as such salesman, agent or solicitor, which permit must be endorsed by him or her in the presence of the City Clerk prior to issuance. If after having granted a permit the City Council shall have reason to believe that the person to whom the permit has been issued, or his agents and solicitors are conducting thereunder a business which is not as described in the application and permit, or are conducting the same in an illegal manner or by misrepresentation or fraud, said applicant shall be summoned to appear before the City Council at any time set by said body, for a hearing to show cause why said permit should not be cancelled, and if the City Council shall find that applicant is so conducting his business, the permit shall be cancelled.

There is hereby levied and imposed an Occupation Tax of Fifteen Dollars ($15.00) per day upon the business of Itinerant Vendor, which tax so levied and imposed shall become due and payable each day in advance. The Occupation Tax so levied may be collected by either distress and sale of the personal property of the person owing such tax, or by suit

in any court of competent jurisdiction to recover the amount thereof. Failure to pay such tax when due or to provide the bond hereby required, shall cause the revocation of the permit by the City Clerk without notice and any person who shall refuse or neglect to pay the tax when due shall be liable to a fine of not less than Five Dollars ($5.00) nor more than Fifty Dollars ($50.00), and the Court may commit to the City Jail any person or persons against whom such fine shall be assessed until the fine shall be paid or otherwise satisfied.

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22-1.5. PERMIT REVOKED; PENALTIES. (a) Any holder of permit hereunder convicted in a court of competent jurisdiction of fraud, imposition, misrepresentation, cheating or sharp practice shall have his permit forthwith revoked by the City Clerk and shall not be entitled to receive another permit to peddle in and through the streets and may be fined in any sum not less than Five Dollars ($5.00) for each offense.

(b) Failure to obtain a permit for the uses and purposes as set out in Section 22-1.1 of this Article shall constitute a misdemeanor and upon conviction thereof the offender shall be fined in a sum not exceeding One Hundred Dollars ($100.00) or imprisoned not exceeding ninety days.

**Ordinance No. 15524**

AN ORDINANCE to amend Chapter 22, Article 1 of Ordinance No. 14924, by adding thereto two sections to be designated Section 22-1.6 and 22-1.7, providing for the furnishing of a surety bond and health certificates by itinerant vendors and by amending Section 22-1.6 to provide penalties for the violation of said Article 1 as amended.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF OMAHA:

Section 1. That Chapter 22, Article 1 of Ordinance No. 14924, be, and the same hereby is, amended by the addition thereto of the following section:

22-1.6. SURETY BONDS REQUIRED. Every itinerant vendor operating within the City of Omaha, in addition to the license fee herein specified, shall deposit with the city clerk a surety bond in the sum of not less than Five Thousand Dollars ($5,000.00), executed by a surety company authorized to do business in the State of Nebraska, conditioned upon the faithful compliance by the licensee, his servants, and agents, with the terms and requirements of this ordinance and also conditioned to indemnify any purchaser of goods, wares, or merchandise from the licensee, his servants, or agents against loss or damage by reason of misrepresentation as to the kind, quality, or value of the said goods, wares, or merchandise. The term of the said bond shall be at least one year from the date of filing the same with the city clerk, and the bond shall designate one or more local officers of the surety company as agents for service of process upon the licensee in any law suit arising out of any sale of such goods, wares, or merchandise.

Section 2. That Chapter 22, Article 1 of Ordinance No. 14924, be, and the same hereby is, amended by the addition thereto to the following section:

22-1.7. *Health Certificates Required.* Before any license shall be issued hereunder, every itinerant vendor shall furnish, as a part of his application for such license, a health certificate by a duly licensed physician licensed to practice as such physician within the State of Nebraska, certifying that the licensee and all employees connected with such business are free from any contagious or infectious disease.

Section 3. That Section 22-1.5 of Ordinance No. 14924, which now reads as follows:

22-1.5. PERMIT REVOKED; PENALTIES. (a) Any holder of permit hereunder convicted in a court of competent jurisdiction of fraud, imposition, misrepresentation, cheating or sharp practice shall have his permit forthwith revoked by the City Clerk and shall not be entitled to receive another permit to peddle in and through the streets and may be fined in any sum not less than Five Dollars ($5.00) nor more than Fifty Dollars ($50.00) for each offense.

(b) Failure to obtain a permit for the uses and purposes as set out in Section 22-1.1 of this Article shall constitute a misdemeanor and upon conviction thereof the offender shall be fined in a sum not exceeding One Hundred Dollars ($100.00) or imprisoned not exceeding ninety days.

shall be amended to read as follows:

22-1.5 PERMIT REVOKED; PENALTIES. (a) Any holder of permit hereunder convicted in a court of competent jurisdiction of fraud, imposition, misrepresentation, cheating or sharp practice shall have his permit forthwith revoked by the City Clerk and shall not be entitled to receive another permit to peddle in and through the streets and may be fined in any sum not less than Five Dollars ($5.00) nor more than Fifty Dollars ($50.00) for each offense.

(b) Failure to obtain a permit for the uses and purposes as set out in Section 22-1.1 of this Article or failure to furnish the surety bond as required by Section 22-1.6 of this Article or failure to furnish the health certificates required by Section 22-1.7 of this Article shall constitute misdemeanors and upon conviction the offender shall be fined in a sum not exceeding One Hundred Dollars ($100.00) or imprisoned not exceeding ninety days for each offense.

Section 4. This Ordinance shall be in full force and effect from and after fifteen (15) days after its passage.

Passed: Sept. 3, 1946.

C. W. LEEMAN,
*Mayor and President of City Council.*

Introduced by Commissioner:
HARRY TRUSTIN.

Attest:

M. J. DINEEN, JR.,
*City Clerk.*

Approved as to Form:

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*City Attorney.*